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Supreme Court of the United States

OCTOBER TERM, 1965

No. 821

BENJAMIN INDIVIGLIO,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1965

No.

BENJAMIN INDIVIGLIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Benjamin Indiviglio, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on October 28, 1965, which unanimously affirmed the judgment of conviction entered in the United States District Court for the Southern District of New York on November 16, 1964.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A) is not yet reported. The decision of said Court denying petitioner's petition for rehearing (Appendix B) is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 28, 1965. A timely petition for rehearing was thereupon filed with said Court on November 10, 1965, and was denied on November 17, 1965.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether petitioner's Sixth Amendment rights were violated by the admission in evidence, over objection, of incriminating statements allegedly made by petitioner during interrogation by a government agent after indictment and in the absence of counsel?

2. Whether the admission in evidence of incriminating statements elicited from petitioner during post-indictment interrogation by a government agent, in the absence of counsel, constitutes "plain error" within the purview of Rule 52(b) of the Federal Rules of Criminal Procedure requiring reversal of the judgment of conviction herein?

3. Where a Court of Appeals, *sua sponte*, finds a controlling or persuasive ground for affirming the judgment of conviction in a criminal case, does our adversary system not require that counsel for the defendant be afforded an opportunity for written or oral argument addressed to that ground, and where such opportunity is not provided, is the defendant not deprived of due process and, in effect, the right to counsel on appeal?

Statement

On July 31, 1961, petitioner was released on $20,000 bail in connection with indictment 60 Cr. 436 filed in the United States District Court for the Southern District of New York (A6a).*

On September 7, 1961 petitioner failed to appear as required and the bail was forfeited (A7a). Petitioner's whereabouts were unknown, and efforts by the bondsman and by Agent Francis A. Torpey of the Federal Bureau of Investigation to locate him proved unsuccessful (A7a-8a).

Thereafter, on June 29, 1962, Indictment 62 Cr. 700 was filed, charging petitioner with "jumping bail" in violation of Title 18 United States Code § 3146, in that he "unlawfully, wilfully and knowingly did fail to surrender himself within thirty days following the date of such forfeiture" (A1a, A4a).

On May 26, 1964 petitioner arrived at Kennedy International Airport on a Varig Airlines flight from Rio de Janeiro (A8a-9a), where he had been living and doing missionary work (A11a-12a). As soon as petitioner stepped off the plane, he was placed under arrest by Agent Torpey (A9a).

Petitioner had previously retained counsel in connection with Indictment 60 Cr. 436, and he asked Agent Torpey whether he had "seen or heard from an attorney" on his behalf (A10a). The agent replied that he had not (A10a).

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* References in parentheses preceded by the letter "A" are to pages of Appellant's Appendix filed with the United States Court of Appeals for the Second Circuit.

Agent Torpey informed petitioner of the charge against him and allegedly advised him of his right to counsel and his right "not to say anything to me if he didn't want to" (A9a). Without affording petitioner an opportunity to contact counsel, however, the agent immediately questioned him with respect to the charge for which he had been indicted (A10a). Over repeated objection by defense counsel, the agent was permitted to testify (A10a) that:

> "I, after advising Mr. Indiviglio what the charge was against him, I asked him why he jumped bail and he advised me that he had requested a severance from the defendants in the other case and he had been turned down and he did not desire to stand trial with these other men."

Petitioner was then taken to the Manhattan office of the Federal Bureau of Investigation, where he was detained for over an hour before being brought to the United States Commissioner's office for the Eastern District of New York where he was arraigned (A10a-11a).

The above-quoted testimony by the agent was vital to the Government's case, since it provided the only evidence tending to show that petitioner "willfully" failed to surrender himself within thirty days following the date of the forfeiture—an essential element of the crime charged (18 U.S.C. § 3146). The record is absolutely devoid of evidence that petitioner knew of the forfeiture.

Reasons for Granting the Writ

1. Must the preservation of individual rights yield to the supposed needs of law enforcement agencies? Is the right to counsel to be upheld only when it does not inter-

fere with the police in their war against crime? In *Escobedo* v. *Illinois*, 378 U.S. 478, 488-490, this Court answered such questions by declaring that:

> "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.
>
> * * * * *
>
> "No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

One month earlier, in *Massiah* v. *United States*, 377 U.S. 201, this Court had held that incriminating statements deliberately elicited by federal agents from a defendant after indictment and in the absence of counsel could not constitutionally be used as evidence against him. *Escobedo* was but the logical extension of *Massiah*, and a recognition by this Court that "no meaningful distinction can be drawn between interrogation of an accused before and after formal indictment" (378 U.S. at p. 486).

Since these highly controversial decisions were rendered, many courts have assumed for themselves the power to consider anew the priority to be accorded these competing interests. A number of them have differed from this Court and have struck the balance in favor of the supposed necessities of law enforcement at the expense of the individual's rights. Seizing upon the words "under the circumstances here" (378 U.S. at p. 492), these courts have sought to

limit the effect of *Escobedo* to its precise facts, disregarding the general principles so clearly enunciated therein.

These attempts to narrowly circumscribe the constitutional right to counsel have given rise to a conflict of authority in both state and federal courts on such subsidiary issues as: whether the right depends upon a request for counsel? Whether admissions elicited during interrogation in the absence of counsel but after the accused has been informed of his rights are constitutionally admissible in evidence? What, if anything, constitutes an effective warning?

This Court has recently granted certiorari in cases presenting these and related issues (*Miranda* v. *Arizona*, 401 P. 2d 721 cert. granted 11/22/65 (No. 759); *Westover* v. *United States*, 342 F. 2d 684 cert. granted 11/22/65 (No. 761) 34 U.S.L.W. 3194), and it is to be hoped that the disposition of these cases will authoritatively resolve much of the existing uncertainty and controversy in the area of *pre-indictment* interrogation.

Since this Court does not render advisory opinions, however, but only decides the issues presented by the cases before it, we respectfully submit that certiorari should also be granted in a *post-indictment* case in which the defendant was advised of his right to counsel before commencement of the interrogation.

The case at bar is such a case. The facts are simple and undisputed, the issues narrow and clearly defined. It would be directly controlled by *Massiah* were it not for the added fact that Agent Torpey advised petitioner of his right to counsel—although he did not afford him the opportunity to

consult with his counsel—before commencing the questioning.

A review of the instant case will afford this Court the opportunity to state whether a result contrary to *Massiah* is dictated by the presence of this additional element. We do not believe that it is. We interpret *Massiah* as establishing an absolute rule, prohibiting the use of any admissions elicited during post-indictment questioning, whether or not the accused was advised of his rights (*Queen* v. *United States*, 335 F. 2d 297; *People* v. *Meyer*, 11 N.Y. 2d 162, 227 N.Y.S. 2d 427).

As this Court stated in *Von Moltke* v. *Gillies*, 332 U.S. 708, 725-726:

> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provisions."

Moreover, the absolute nature of the constitutional prohibition appears from this Court's quotation with approval in the *Massiah* case (377 U.S. 201, 206) of the "constitutional rule" expressed by the New York Court of Appeals in *People* v. *Waterman*, 9 N.Y. 2d 561, 565, 216 N.Y.S. 2d 70, 75: "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." (See also, *United States* v. *Guerra*, 334 F. 2d 138 cert den. 379 U.S. 936).

The reason for such an absolute rule becomes apparent when it is remembered that the government is required to set forth in the indictment a "definite written statement of the essential facts constituting the offense charged" (Rule 7, F.R. Crim. P.). Accordingly, there must already have been presented to the Grand Jury legally sufficient evidence to convict the defendant, and the "necessities of appropriate police investigation to solve a crime or even to absolve a suspect cannot be urged as justification for any subsequent questioning of the defendant" (*People* v. *Waterman*, 9 N.Y. 2d 561, 565, 216 N.Y.S. 2d 70, 74-75). The only purpose for further questioning at this late stage is the constitutionally prohibited one of attempting to elicit from the defendant's own mouth incriminating admissions to be used as evidence against him.

2. The Court below refused to pass upon the merits of petitioner's contention that his constitutional rights were violated by the admission in evidence of incriminating statements elicited from him by a federal agent during post-indictment questioning in the absence of counsel. Instead, it stated that: "We affirm on the ground that the failure to make proper objection before the trial court to the admission of the challenged evidence forecloses review of the asserted error" (p. A2 *infra*).*

While we believe that trial counsel's repeated objections to the admission of these statements were more than adequate to alert the trial judge to the error and to preserve

* After acknowledging trial counsel's repeated objections, the Court stated more specifically that: "We reject appellant's claim of error because he failed to specify in his objection to the admission of the challenged evidence the *Massiah* or *Escobedo* issues on which he now seeks to rely." (p. PPA5-6 *infra*).

the point for review, it is unnecessary to debate the issue. Rule 52(b) of the Federal Rules of Criminal Procedure, quoted in full in the opinion, confers ample authority upon the Court below to consider the merits of a substantial constitutional claim such as that raised by petitioner, even in the absence of a specific objection.* In fact, the opinion leaves no doubt as to the Court's power for it stressed that (p. A9 *infra*)

> "even without the explicit permission of Rule 52(b), it is within our 'inherent power' to notice errors without objection 'if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' *United States* v. *O'Connor*, 237 F. 2d 466, 472 (2d Circ. 1956), quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)."

We do not see how it can seriously be maintained that the violation of petitioner's right to counsel so clearly disclosed by the undisputed evidence can be deemed anything but "plain error".

Indeed, if the Court below had not chosen to avoid the issues presented, the likelihood is great that petitioner's conviction would have been unanimously reversed. This is apparent from the various opinions filed by 6 of the 8 active circuit judges in *United States* v. *Cone*, __ F. 2d __ (No. 450, Sept. Term 1964, decided 11/22/65) and *United States*

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* In *United States* v. *Acardi*, 342 F. 2d 697, 701 petition for cert. pending (No. 111), the Court below discussed the merits of a similar contention even though the objection was not raised at trial. There, however, the Court was able to find that the "incident . . . [was] not within the prohibited area of post-indictment interrogation in the absence of defense counsel. *United States* v. *Guerra*, 334 F. 2d 138."

v. *Robinson*, F. 2d (No. 429, Sept. Term 1964, decided 11/22/65).*

Both of these cases involved *pre-indictment* questioning. In each, a majority of the Court voted to affirm the conviction. While we note our disagreement with these decisions, whether they were correctly decided is unimportant for our present purposes. What is significant is that the opinions clearly indicate that a majority, if not all, of the active circuit judges would hold *post-indictment* questioning such as occurred in the instant case to be constitutionally prohibited.

Thus, in his dissenting opinion in the *Robinson* case, Judge Anderson noted that

> "It is particularly difficult to determine in a specific case the precise time when the right to the assistance of counsel takes hold. After it has, unless the suspect 'competently and intelligently' waives his rights, any statements resulting from the interrogation must be excluded at the trial"
>
> * * * * *
>
> "Under its [Escobedo's] rationale the Sixth Amendment right to counsel attaches somewhere between arrest and arraignment."

Judge Waterman expressly noted that he concurred fully with Judge Anderson's dissenting opinion. Judge Smith, also dissenting in the *Robinson* case, filed a separate opinion wherein he noted that inasmuch as the investigation

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* These were two of the other cases presenting *Massiah* and *Escobedo* issues which the Court, *sua sponte*, ordered reconsidered *en banc* (see p. A2 *infra*). The decisions were rendered less than one week after the Court's denial of petitioner's application for rehearing.

had focused upon Robinson, his subsequent statements, even though "voluntary and the result of 'routine' questioning" could not be used as evidence against him unless it first appeared that he had knowingly and voluntarily waived his right to counsel.

In his concurring opinion in the *Cone* case, Judge Friendly stated:

> "Equally clearly, an indictment or information marks a stage when a 'criminal prosecution' has begun and a suspect has become an 'accused'; such surprise as there was in *Massiah* v. *United States*, 377 U.S. 201 (1964), lay in its holding that the Assistance of Counsel clause applied to questioning by a confederate acting at the government's behest, *as it clearly would have to questioning by the prosecutor himself.*" (Emphasis added.)

Chief Judge Lumbard and Judge Kaufman agreed with Judge Friendly's opinion.

Unless the decision of the Court below is clarified upon review in this Court, it is apt to lead to great confusion and a continuation of illegal practices on the part of law enforcement officials. The affirmance of petitioner's conviction by the Court below might easily be interpreted as meaning that it was not "plain error" to admit in evidence statements elicited after indictment and in the absence of counsel. If this was not error, however, what features of the instant case distinguish it from *Massiah*? Was it the fact that the agent allegedly advised petitioner of his rights? This should make no difference (*Von Moltke* v. *Gillies, supra; Queen* v. *United States*, 335 F. 2d 297, 298; *Ricks* v. *United States*, 334 F. 2d 964, 970; *People* v. *Meyer*,

11 N.Y. 2d 162, 227 N.Y.S. 2d 427; *People* v. *Pizzaro,* 15 N.Y. 2d 803, 257 N.Y.S. 2d 600).

On an important constitutional question such as that presented by the case at bar, the trial courts and the bar generally should not have to speculate as to what the Court held. They should not be required to read between the lines of an opinion which professes not to pass upon the merits.

This Court has the power to notice "plain error" even though not assigned or specified below (*Silber* v. *United States,* 370 U.S. 717).* Since the Court of Appeals refused to pass upon the merits of petitioner's contentions, we respectfully request that this Court examine his claim and act upon the "plain error" presented by the record.

3. The opinion of the Court below sets forth at length the repeated efforts of defense counsel, before as well as during the trial, to have excluded the incriminating statements petitioner allegedly made to Agent Torpey. It notes that the pre-trial motion to suppress "was broadly" worded, maintaining, among other things, that any statements by petitioner should be suppressed on the ground that they were "obtained *during the course of an unlawful* arrest, detention, search, seizure and *interrogation* . . ." (p. A4 *infra*; emphasis added).

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* In *White* v. *Maryland,* 373 U.S. 59, defendant did not object at his trial to the introduction of evidence with respect to his plea of guilty at a preliminary hearing when he was not represented by counsel. This Court did not hesitate to reverse. It also appears from the opinion of the Court of Appeals in *Westover* v. *United States,* 342 F. 2d 684 cert. granted 11/22/65 (No. 761) that the defendant did not make appropriate objections during his trial.

The Court then observes that the trial of this case occurred several months after the decisions in *Massiah* and *Escobedo* were handed down. From this chronology the Court concludes that:

> "It was to be expected that experienced trial lawyers, such as those who represented defendant at his trial, took note of these decisions and evaluated their relevance to defendant's post-indictment statements (p. A6 *infra*).
>
> * * * * *
>
> "In view of the fact that defendant had retained experienced trial counsel and that his trial postdated the *Massiah* and *Escobedo* decisions, the failure to object on the ground now advanced must be considered something more than a mere technical defect" (p. A10 *infra*).

The Court's conclusion is, of course, based on nothing more substantial than its own speculation.

The opinion concludes with the further comment that:

> "It is unnecessary for us then to reach the question whether the failure to object was the result of defendant's intentional waiver of whatever right he may have had to exclusion of this evidence" (p. A10 *infra*).*

We frankly confess our inability to follow the reasoning of the Court below. It would appear, however, that the Court is saying that experienced trial counsel, although strenuously objecting repeatedly to the admission of petitioner's post-indictment statements, deliberately failed to advance a strong and persuasive argument in support of their objections.

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* No such question was raised, briefed or argued.

This is not a case such as *Henry* v. *United States*, 379 U.S. 443, where the evidence suggested plausible reasons for counsel's decision not to object as a strategic move. Here, counsel repeatedly objected to the admission of the challenged evidence. Yet the Court's opinion suggests that counsel deliberately chose not to buttress their objection with their most powerful argument. Such conduct is incomprehensible and ought not to be attributed to capable trial counsel.

It is inconceivable that experienced counsel who, as the Court below believed (p. A6 *infra*), "took note of these decisions and evaluated their relevance to defendant's post-indictment statements" would not have claimed a violation of petitioner's Sixth Amendment rights along with the many other grounds they advanced in support of their objection, especially since their other arguments proved unsuccessful.

Indeed, no such contention was ever made by the Government in its brief or during argument. Thus, at pages 4-5 of its brief below, the Government merely claimed that "since the present basis for exclusion of the evidence was never presented to the Court below it is not available on appeal." It was never suggested that trial counsel were aware of the *Massiah* and *Escobedo* decisions and that they deliberately failed to raise the obvious violation of appellant's Sixth Amendment right to counsel. The answer, of course, is that neither counsel nor the experienced trial judge were familiar with these recent decisions.

This question did not arise during the argument before the panel which heard petitioner's appeal, but from whom the case was withdrawn when it was ordered reconsidered

*en banc.** Petitioner, therefore, was given no opportunity to reply to or counter the argument developed by the Court *sua sponte* and which it obviously deemed persuasive, if not controlling. As noted above, petitioner's application for rehearing was denied.

We respectfully submit that the action of the Court below not only violates petitioner's right to counsel, but is completely at odds with our traditional concepts of fundamental fairness.

In *Douglas* v. *California*, 372 U.S. 353, this Court made obligatory upon the states as a matter of constitutional law the federal requirement that an indigent be furnished counsel on appeal (*Johnson* v. *United States*, 352 U.S. 565; *Ellis* v. *United States*, 356 U.S. 674). The majority rejected the argument that an impartial appellate court's "expert and conscientious legal appraisal of the merits of his case on the basis of the trial record" (372 U.S. at p. 365, dissenting opinion) could serve as an adequate substitute for representation by an able advocate.

Obviously, however, the right to counsel is meaningless if counsel is not given the opportunity to point out the alleged errors below and to challenge and rebut every argument advanced on appeal in support of an affirmance of the judgment of conviction.

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* The original panel consisted of Circuit Court Judges Joseph Smith and Thurgood Marshall, and District Court Judge Charles Metzner. During argument, counsel's remarks as well as questioning from the bench were directed primarily to the merits of petitioner's contention. Thus, for example, Judge Marshall questioning a statement of the Assistant United States Attorney asked whether it was not a fact that the agent interrogated petitioner in order to obtain information for use against him at his trial.

If, as in the case at bar, a criminal conviction may be sustained on a ground neither briefed nor argued, but arrived at by the Court *sua sponte*, then there would be no need for—and certainly no constitutional requirement for—counsel on appeal.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

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THOMAS R. NEWMAN
Of Counsel

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 378—September Term, 1964.

(Argued March 10, 1965; ordered to be reconsidered *en banc* May 26, 1965 Decided October 28, 1965.)

Docket No. 29404

UNITED STATES OF AMERICA,

Appellee,

—v.—

BENJAMIN INDIVIGLIO,

Appellant.

Before:

LUMBARD, *Chief Judge,*
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,
HAYS and ANDERSON, *Circuit Judges.*

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge,* sitting with a jury, of a violation of the bail-jumping statute, 18 U. S. C. §3146 (1964).

Affirmed.

JEROME LEWIS, Brooklyn, N. Y. (Thomas R. Newman, New York, N. Y., of counsel) *for Appellant.*

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

HOWARD L. JACOBS, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Martin R. Gold, Assistant United States Attorney, New York, N. Y.), *for Appellee.*

HAYS, *Circuit Judge* (with whom Chief Judge Lumbard, and Judges Waterman, Moore, Friendly, Smith, Kaufman and Anderson concur):

Defendant appeals from a judgment of conviction based on a jury verdict that he violated the bail-jumping statute, 18 U.S.C. §3146 (1964).[1] His appeal was first heard by a panel of this court, but on May 26, 1965, we ordered that his appeal be reconsidered by the active judges *en banc* together with six other cases, all involving issues raised by *Massiah* v. *United States,* 377 U. S. 201 (1964), and *Escobedo* v. *Illinois,* 378 U. S. 478 (1964).

In his brief and argument appellant presses only one point—that his own post-indictment statement made to an agent of the Federal Bureau of Investigation when he was without counsel was erroneously introduced at his trial in violation of his rights under the rule of *Massiah* v. *United States, supra.*

We affirm on the ground that the failure to make proper objection before the trial court to the admission of the challenged evidence forecloses review of the asserted error.

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[1] "Whoever, having been admitted to bail for appearance before any . . . court of the United States, incurs a forfeiture of the bail and willfully fails to surrender himself within thirty days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony . . . , be fined not more than $5,000 or imprisoned not more than five years, or both . . ."

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

Defendant was indicted on a narcotics charge and released on $20,000 bail. He failed to appear in court as directed on September 5 and 6, 1961, and his bail was held forfeited on September 7, 1961. He was indicted under the present charge of bail-jumping on June 29, 1962. At that time he was residing in Brazil. On May 24, 1964, defendant was arrested in Rio de Janeiro by Brazilian authorities who charged him with illegal entry into Brazil. The next day he was placed on a plane for New York.

On May 26 defendant was arrested by FBI agents who were awaiting his arrival at the airport in New York. FBI Agent Torpey testified that he "approached Mr. Indiviglio, told him who I was and placed him under arrest . . . at the bottom of the stairs that lead off from the airplane." Agent Torpey also testified, "I advised him of the charges against him. I told him that he had a right not to say anything to me if he didn't want to and that he had a right to counsel." Continuing his testimony Torpey said that defendant told him something of his activities during his stay in Rio de Janeiro.[2] Torpey then went on:

> "I, after advising Mr. Indiviglio what the charge was againsnt him, I asked him why he jumped bail and he advised me that he had requested a severance from the defendants in the other case and he had been turned down and he did not desire to stand trial with these other men.
>
> * * * * *

[2] "He advised me that he had been residing in Rio de Janeiro, Brazil in a private home down there; that he had been employed as a travel guide; that he had sold jewelry on occasion and had also acted as a director of motion pictures while residing in Rio de Janeiro."

"He asked me at one point if I had seen or heard from an attorney. He didn't identify the attorney. I told him no, I had not."

The agents took defendant to their Manhattan office, and he was brought before a United States Commissioner for a preliminary hearing.

Soon thereafter defendant secured the services of experienced counsel. His lawyer moved to suppress "as evidence all property obtained from and statements made by the defendant from the time of his arrest in Brazil until the time of his arraignment . . . on the ground that said property and statements were obtained during the course of an unlawful arrest, detention, search, seizure and interrogation . . ." This motion was labeled as brought under Rules 41(e) and 9(c)(1) of the Federal Rules of Criminal Procedure which pertain, respectively, to the illegal seizure of property and the requirement of a prompt hearing for persons arrested by federal officers pursuant to a warrant. The affidavit of defendant's counsel alleged that defendant had been kidnapped by federal agents in Brazil and forcibly brought to the United States without any legal authority for such action at the place of his arrest.

During Agent Torpey's testimony at the trial, defense counsel repeatedly objected on the same grounds as those advanced in defendant's pretrial motion. Judge Murphy overruled these objections; at one point he asked whether the objection was any different from defense counsel's earlier objection. Defense counsel stated that the objection was "for the reasons covered in my motion." When Torpey

was asked what defendant had said, defense counsel made a general objection which was also overruled. The prosecutor during his summation emphasized Torpey's testimony concerning defendant's reason for going to Brazil without any objection by defendant.[3] At the time defendant was sentenced, he moved for a new trial, pointing out "the matter of the testimony of the FBI agent, as to what was told him by the defendant upon the defendant's arrival from Rio de Janeiro." He specifically renewed the claim made in the pretrial motion and protested the trial court's failure to hold a hearing on those allegations. Judge Murphy observed that perhaps defendant might better have argued for exclusion on the grounds of delay after arrest "under the McNabb case," but held that "no evidence was submitted with regard to that." The motion for a new trial was denied.

In summary, defense counsel made no contention in his pretrial motion, during the trial, nor in his post-trial motion, that defendant had been deprived of his Sixth Amendment right to counsel, nor, except for his question to the FBI agent about an unidentified attorney, does it appear in the record that defendant had retained a lawyer or requested the aid of counsel. The testimony shows that defendant was informed of his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel.

We reject appellant's claim of error because he failed to specify in his objection to the admission of the challenged

[3] "You will recall what the defendant Indiviglio told Agent Torpey that Agent Torpey testified to. . . . He said he didn't want to go to trial and that is why he went down to Rio de Janeiro."

evidence the *Massiah* or *Escobedo* issues on which he now seeks to rely. Defendant's trial occurred on October 26, 1964, several months after the decision of the Supreme Court in *Massiah* v. *United States, supra,* and *Escobedo* v. *Illinois, supra,* which were handed down, respectively, on May 18 and June 22, 1964. It was to be expected that experienced trial lawyers, such as those who represented defendant at his trial, took note of these decisions and evaluated their relevance to defendant's post-indictment statements.

Defendant's pretrial motion for suppression of the challenged testimony failed reasonably to apprise the trial judge of the grounds asserted here. The notice of motion itself was broadly worded and encompassed so many possible errors in the pretrial proceedings that it failed to particularize any one specific ground. The supporting affidavit set forth facts bearing upon only one claim—that the defendant was illegally brought into the country by federal agents. The objections at the trial either renewed this specific objection or were merely general in form.

> "At best this is a general objection which is insufficient to preserve such a specific claim as violation of a constitutional provision in obtaining the evdence. Wigmore on Evidence, §18(C)(1). Some jurisdictions recognize an exception to the rule that an overruled general objection cannot avail proponent on appeal in the case where it appears on the face of the evidence that it is admissible for no purpose whatever, or where the nature of the precise specific objection which could be made is readily discernible. . . . But this exception is generally con-

> fined to the cases where such evidence was plainly irrelevant. *Where, as in this case, the objection relies on collateral matter to show inadmissibility, and in addition the exclusionary rule to be relied on involves interpretation of the Constitution, the orthodox rule of evidence requiring specification of the objection is buttressed by the uniform policy requiring constitutional questions to be raised at the earliest possible stage in the litigation.*" *On Lee* v. *United States,* 343 U.S. 747, 750 n. 3 (1952). (Emphasis added.)[4]

Wigmore says "the cardinal principle (no sooner repeated by Courts than ignored by counsel) is that a *general objection, if overruled,* cannot avail the objector on appeal,"[5] and "a specific objection *overruled* will be effective to the extent of the grounds specified, and no further."[6]

This court has consistently followed these rules of evidence by requiring that an objection state accurately the ground on which inadmissbility is claimed and state this with a reasonable degree of specificity. See *Taylor* v. *Baltimore & O. R.R.,* 344 F. 2d 281, 287 (1965), cert. denied, 34 U. S. L. Week 3119 (U.S. Oct. 12, 1965) (No. 309); *United States* v. *Franscone,* 299 F. 2d 824, 827, cert. denied, 370 U.S. 910 (1962); *United States* v. *Ladson,* 294 F. 2d 535, 538-40 (1961), cert. denied, 369 U.S. 824 (1962); *United States* v. *Schupper Motor Lines, Inc.,* 262 F. 2d 859, 862 (1959); *United States* v. *Sing Kee,* 250 F. 2d 236, 241-42

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[4] Justices Frankfurter, Douglas and Burton dissented on grounds unrelated to this point. Justice Black also wrote separately, without discussing the point.

[5] 1 Wigmore, Evidence §18, at 332 (3d ed. 1940).

[6] *Id.* at 339.

(1957), cert. denied, 355 U.S. 954 (1958); *United States* v. *O'Connor*, 237 F. 2d 466, 471-72 (1956); *United States* v. *Sansone*, 231 F. 2d 887, 891, cert. denied, 351 U.S. 987 (1956); *United States* v. *Gillette*, 189 F. 2d 449, 453, cert. denied, 342 U.S. 827 (1951); *United States* v. *Mascuch*, 111 F. 2d 602, 603, cert. denied, 311 U.S. 650 (1940). See also Uniform Rules of Evidence, Rule 4 (1953).

The reason for requiring that specific objection be made is, of course, to give the judge an opportunity to correct the error and thus to avoid the necessity of further proceedings, possibly including a new trial. In the present case, for example, a proper objection might have resulted in the striking out of the evidence objected to and an admonition to the jury to disregard it. It seems entirely possible that the government could have secured a conviction without the challenged evidence. Or, as an alternative, the judge might have conducted a *voir dire* into the circumstances surrounding Indiviglio's statement. He might have sought explanation of defendant's query whether an unidentified attorney had contacted Agent Torpey. As it was, in the absence of objection, it was not determined whether defendant had or had not already retained or consulted counsel before his arrival in the United States. A *voir dire* might have established that defendant waived the assistance of counsel. The failure to make a proper objection also leaves the precise sequence of Torpey's warnings and defendant's statements uncertain.

Notwithstanding appellant's failure to raise sufficient objection to violation of his right to counsel, this court could notice the alleged error under Rule 52(b) of the Federal Rules of Criminal Procedure which provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Federal courts, including the Supreme Court, have declined to notice errors not objected to below even though such errors involve a criminal defendant's constitutional rights. See, e.g., *Stein* v. *New York*, 346 U.S. 156, 174 n. 17 (1953), *overruled in part by Jackson* v. *Denno*, 378 U.S. 368, 391 (1964); *United States* v. *Ballou*, 348 F. 2d 467 (2d Cir. July 14, 1965); *United States* v. *Stein*, 342 F. 2d 491 (2d Cir. 1965).

Exercise of our power to notice even "plain error," in spite of the lack of proper objection below, is discretionary. *On Lee* v. *United States*, 343 U.S. 747, 750 n. 3 (1952); see *Lopez* v. *United States*, 373 U.S. 427, 436-37 (1963); *Silber* v. *United States*, 370 U.S. 717 (1962). For example, even without the explicit permission of Rule 52(b), it is within our "inherent power" to notice errors without objection "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *O'Connor*, 237 F. 2d 466, 472 (2d Cir. 1956), quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936).[7]

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[7] Appellate courts often notice error not objected to below when, under the law existing at the time of the trial, objection would have been futile and when error was asserted on review on the basis of a subsequent appellate decision. *United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12, 16 (2d Cir. 1964) (*en banc*), aff'd, — U.S. — (1965); see *White* v. *Maryland*, 373 U.S. 59 (1963); *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 411-12 (1947). Similarly, it is in the interests of justice to notice error not objected to by one defendant if another defendant's conviction has been reversed on the basis of that same error. See *United Brotherhood of Carpenters* v. *United States, supra.*

In this case we see no reason for finding reversible error. In view of the fact that defendant had retained experienced trial counsel and that his trial postdated the *Massiah* and *Escobedo* decisions, the failure to object on the ground now advanced must be considered something more than a mere technical defect. In any event there is nothing in the case which would dispose us to exercise our discretion to notice "plain error" under Rule 52(b).[8]

Affirmed.

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[8] It is unnecessary for us then to reach the question whether the failure to object was the result of defendant's intentional waiver of whatever right he may have had to exclusion of this evidence. See *Henry* v. *Mississippi*, 379 U.S. 443, 449-53 (1965); *Abel* v. *United States*, 362 U.S. 217, 230-34 (1960); *Lawn* v. *United States*, 355 U.S. 339, 354-55 (1958); *Johnson* v. *United States*, 318 U.S. 189, 199-201 (1943).

APPENDIX B

Decision of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

BENJAMIN INDIVIGLIO,

Appellant.

PETITION FOR REHEARING AND TO STAY ISSUANCE OF MANDATE PENDING APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Jerome Lewis, Brooklyn, New York,
for appellant.

Before:

LUMBARD, *Chief Judge*, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and ANDERSON, *Circuit Judges*.

The petition for rehearing is denied.

The motion for a stay of the mandate and the continuance of release on bail is granted, provided that within thirty (30) days of the date of this order appellant's petition for certiorari is filed with the clerk of the Supreme Court of the United States.

/s/ EDWARD LUMBARD
Chief Judge

November 17, 1965

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 821

BENJAMIN INDIVIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, A1-A10) is reported at 352 F. 2d 276.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1965. A petition for rehearing was denied on November 17, 1965 (Pet. App. B). The petition for a writ of certiorari was filed on Decem-

ber 14, 1965. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in admitting petitioner's incriminating statement into evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of forfeiting bail and willfully failing to surrender himself for a felony trial in violation of 18 U.S.C. 3146. He was sentenced to three years' imprisonment (Tr. 134).[1] The court of appeals, sitting *en banc*, unanimously affirmed the conviction.

1. The government's evidence showed that petitioner was released on $60,000 bail on May 16, 1961, in connection with a narcotics indictment. This was reduced to $20,000 on July 31, 1961 (Tr. 14). The bond, which guaranteed petitioner's appearance when called, was forfeited on September 7, 1961, after petitioner failed to appear as directed and failed to respond to a bench warrant (Tr. 17, 80-81; Exs. 13 and 14). Subsequently the bondsman and the Federal Bureau of Investigation unsuccessfully attempted to locate petitioner (Tr. 25-27, 36-43).

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[1] "Tr." refers to the trial transcript which is being lodged with the Clerk of this Court. "A." refers to petitioner's appendix in the court of appeals which is on file with the Clerk of this Court.

On June 29, 1962, the bail-jumping indictment was returned. An arrest warrant was returned unexecuted on July 6, 1962 (A. 1). On May 26, 1964, petitioner was arrested by an agent of the Federal Bureau of Investigation at Kennedy International Airport as he disembarked from a plane arriving from Brazil (Tr. 43-46). At the airport, petitioner stated to the agent that he had been living in Brazil and working as a guide. When asked by the agent why he had jumped bail, he said that (Tr. 47):

> "he had requested a severance from the defendants in the other case and he had been turned down and he did not desire to stand trial with these other men."

2. Prior to trial petitioner filed motions to dismiss the indictment and to suppress all evidence obtained "from the time of his arrest in Brazil until the time of his arraignment in the Southern District of New York" (Tr. 148). The grounds stated in the motions were that the government had "secured jurisdiction over [petitioner's] person through the violation of United States law and international agreement by its agents" and that the evidence had been obtained "during the course of an unlawful arrest, detention, search, seizure and interrogation" (Tr. 142, 148). Supporting affidavits alleged that petitioner had been seized at gunpoint in Brazil by agents of the United States government and had been forcibly abducted to New York in violation of international agreements and a federal statute (Tr. 143-144, 149-150). An answering affidavit of government counsel (filed on the date of

the trial, for which time the motions were set) stated that petitioner had been arrested for illegal entry into Brazil by Brazilian authorities and that he was sent from that country and placed on an airplane destined for New York by representatives of the Brazilian government (Tr. 152).

When the agent of the Federal Bureau of Investigation testified concerning the arrest at Kennedy Airport, petitioner's counsel objected on the ground that "we are now getting into the area covered by the subject matter of my motion" (Tr. 43). The objection was overruled (Tr. 44), and later renewals of the objection "for the reasons covered in my motion" were similarly rejected (Tr. 45, 46, 47). The agent testified that immediately upon arrest he advised petitioner of the charges, of his right to remain silent, and of his right to counsel (Tr. 46; A. 9a). Some time in the course of the conversation, petitioner asked the agent whether he had "seen or heard from an attorney" whom he did not identify. The agent replied that he had not (Tr. 47).[2] Petitioner was brought to F.B.I. headquarters in New York at about 11:15 a.m., and he was taken before a United States Commissioner approximately one and a half hours later (Tr. 48).[3]

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[2] The first notice of appearance on the bail-jumping indictment was not filed until June 8, 1964. Petitioner's trial counsel in the narcotics case had withdrawn, with permission, on May 22, 1961. Petitioner's trial attorney filed a notice of appearance in the narcotics case on May 28, 1964, two days after his arrest in the instant case (Tr. 141).

[3] Petitioner's motion for a new trial was also based on the claim that he had been "falsely arrested and in effect kid-

3. On appeal, petitioner contended that his statements to the agent at the airport were inadmissible under *Massiah* v. *United States*, 377 U.S. 201, which had been decided by this Court five months before petitioner's trial. The court of appeals rejected the contention on the ground that petitioner had failed to assert in the district court the claim that he had been deprived of a Sixth Amendment right (Pet. App. A, A5-A8).

ARGUMENT

1. The record clearly supports the unanimous determination of the *en banc* court of appeals that petitioner failed to assert at any stage of the district court proceedings the constitutional claim that he had been deprived of the assistance of counsel. Petitioner moved to suppress the evidence and objected to its introduction solely on the ground that he had been forcibly abducted and that his statements were the product of that unlawful act. He never argued that the statements were made in violation of rights under the Sixth Amendment. In *On Lee* v. *United States*, 343 U.S. 747, 749-750, n. 3, this Court observed that the rule requiring specific objection is buttressed by the requirement that constitutional issues be raised at the earlies possible stage in the litigation.

The failure to object on this ground prevented the

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naped" (Tr. 133). The court observed that the agent's testimony was unrelated to these charges and that any question of admissibility "under the McNabb case" was foreclosed because no evidence had been submitted on that issue (Tr. 133).

trial court from making any investigation or determination whether petitioner did in fact have an attorney at the time of his statement and whether he knowingly waived his right to consult with counsel. Timely specific objection is required so that the court can make the necessary factual determinations. See *United States* v. *Brown*, 348 F. 2d 661 (C.A. 2), certiorari denied, 382 U.S. 904; *Lawson* v. *United States*, 248 F. 2d 654 (C.A.D.C.), certiorari denied, 355 U.S. 963; *United States* v. *Ladson*, 294 F. 2d 535, 538-539 (C.A. 2), certiorari denied, 369 U.S. 824.[4]

2. In any event the statement made to the F.B.I. agent in the instant case was distinguishable in various respects from that held inadmissible in *Massiah* v. *United States*, 377 U.S. 201. First, Massiah did not know the role being played by the person to whom he spoke and cannot be said to have knowingly waived the presence of counsel at the challenged conversation. Petitioner, on the other hand, knew he was speaking to an agent of the F.B.I. Second, Massiah was not advised by the informer of his right to remain silent or of his right to have counsel present since he was not told that he was speaking to the police. Petitioner was fully advised of these rights. Third, Massiah had retained counsel before the challenged conversation

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[4] Petitioner's claim that the court of appeals decided the case on a ground which it raised *sua sponte* is refuted by the government's brief in the court of appeals, which was addressed in part to petitioner's failure to make the proper objection at trial. See Brief for the United States, pp. 4-5. Petitioner could have filed a reply brief under Rule 15 of the court of appeals' rules or orally argued this issue.

and government agents were, therefore, required to communicate with the accused through his attorney. Petitioner, however, had no counsel of record at the time of the interview (see note 2, *supra*), and the incidental reference to an attorney was insufficient to require termination of the interview. Fourth, Massiah's was a carefully arranged interrogation in the absence of his attorney. Petitioner's statements were made almost immediately upon his arrest in response to preliminary questions asked as he was being taken into custody. Finally, petitioner was not unfamiliar with the criminal process. In addition to having been advised of his right to counsel, he had previously completed a trial on a narcotics charge which had resulted in a mistrial. In *Escobedo* v. *Illinois*, 378 U.S. 478, 490, n. 14, this Court pointed out that a defendant may intelligently waive his right to counsel after being advised of it. In the instant case the warning was given to a sophisticated defendant who, by answering the question, waived his right. See *Jackson* v. *United States*, 337 F. 2d 136 (C.A.D.C.), certiorari denied, 380 U.S. 935; *United States* v. *Konigsberg*, 336 F. 2d 844, (C.A. 3), certiorari denied, 379 U.S. 933; *Davis* v. *State of North Carolina*, 339 F. 2d 770 (C.A. 4) (en banc); *Hayes* v. *United States*, 347 F. 2d 668 (C.A. 8); *Latham* v. *Crouse*, 338 F. 2d 658 (C.A. 10).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.[5]

RALPH S. SPRITZER,
*Acting Solicitor General.**

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
DONALD I. BIERMAN,
Attorneys.

JANUARY 1966

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[5] After the preparation of this brief in opposition we were advised by petitioner's counsel that petitioner died on December 30, 1965. In light of this intervening circumstance, the Court might deem it appropriate to dismiss the petition as moot.

* In lieu of the Solicitor General, who has disqualified himself.

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